

Agricultural Law Memo

ALM 10-05

September 14, 2010

TOPIC: Agri-tourism and Agriculture

ISSUE: Farmers in the Commonwealth have historically used innovative marketing ideas to capture a larger proportion of the retail dollar for their farm products. Some of these marketing techniques, often referred to as agri-tourism, appear to be non-agricultural activities that would otherwise be regulated as a non-agricultural activity. But because agri-tourism activities are incidental to the primary purpose of agriculture, they are extended the same rights and privileges under the law as agricultural activities. MDAR has established certain criteria for those instances when we must differentiate between agri-tourism and non-agricultural activities. We are also often asked to provide these criteria to others to assist in distinguishing one from the other. The purpose of this memorandum is to provide the criteria by which an activity may be deemed agri-tourism as opposed to its non-agricultural counterpart.

Farming and agriculture have considerable rights and privileges under the laws of the Commonwealth, such as reduced taxation, exemption from certain local zoning provisions and state environmental laws, and even preferential treatment under the state building code. So, activities that would otherwise come under the authority or scrutiny of a law or regulation enjoy a certain level of exemption from such authority or scrutiny because the activities are associated with agriculture.

Consider a farm stand, for example. A farmer may construct a small structure on his property near the road to sell vegetables during the summer. Clearly, this is simply selling vegetables and is considered an agricultural activity as defined by Massachusetts General Laws (M.G.L.) c. 128, Sec.1A. In contrast, consider a farmer who constructs a large supermarket type of a building at which not only vegetables from the farm but also the full range of supermarket items are sold. In fact, the products sold from this structure that comes from the farm may only account for a very small proportion of the sales. This would be considered a supermarket, not an agricultural structure. The farm stand is protected as agriculture while the supermarket would not be. The conclusions are intuitive for these two extreme cases, but difficulties arise when the circumstances fall somewhere in between. Agri-tourism activities fall into this difficult area.

Agri-tourism refers to a broad category of planned activities by which the activities and property of an agricultural enterprise serve as a destination for visitors whose objective is to experience agricultural life and operations with resulting benefits to agriculture in the Commonwealth and the economic viability of the agricultural enterprise. Some agri-tourism activities are clearly agricultural in that they include the planting, cultivation or harvest of an agricultural product (e.g. Pick Your Own operations). Accordingly, this ALM is intended to help identify agri-tourism activities that may be incidental to, or so directly related to, the agricultural enterprise as to share the agricultural nature of the enterprise. As a simple measure, the less related the activity is to agriculture, the less the activity ought to be considered agri-tourism.

Among the factors to be weighed in concluding that such activities qualify as agri-tourism are the agricultural focus of: (1) the property itself; (2) its commercial aspects; (3) the activities involved; and (4) the accommodations or other benefits accorded to the visitor.

Answers to the following questions are meant to assist in weighing whether an activity is agri-tourism.

The Property: At the most basic level, the primary underlying use of the property must be agricultural as defined by law. The following questions help establish the primary use as agriculture:

(1) Are “farming” or “agricultural” activities as defined in M.G.L. c. 128, Sec. 1A taking place on the property?

(2) What is the size of the property?

(3) What agricultural products derive from the property?

(3) Does the property enjoy the benefits accorded under M.G.L. c. 61 or 61A, or under M.G.L. c. 40A, Sec. 3?

The Commercial Aspects: A property may meet the basic threshold of agriculture, but still may not be considered commercial agriculture where revenues from supplemental agri-tourism activities predominate over agricultural revenues:

(1) What is the primary focus of the commercial activities at the property?

(2) What percentage of the revenues from the property is generated from commercial agricultural activities as opposed to the revenue derived from the supplemental agri-tourism activities?

(3) Is the commercial agricultural activity directed at consumers?

(4) What is the potential for improving the economic viability of the enterprise for continued use in connection with the supplemental agri-tourism activity?

(5) Is the property marketed or used as a visitor destination, or is the property marketed or used as ancillary to off-property destinations such as sports venues or museums?

The Activities: Often a property may demonstrate its primary use as agriculture by the preponderance of activities conducted on the property and the relationship of those activities with agricultural activities:

(1) Are agri-tourism activities primary, supplemental, or complementary to the use of the property?

(2) What percentage of the activities occurring on the property are agri-tourism activities?

(3) What is the primary use of the property when agri-tourism activities are not taking place?

(4) Are the agri-tourism activities designed specifically to bring the public to the property for an agricultural related experience?

(5) Are the agri-tourism activities designed to enhance the viability of a traditional agricultural operation?

The Accommodations: The kind of accommodations made available to visitors can shed light on whether those accommodations should be treated as part of the agricultural enterprise or are essentially non-agricultural commerce. Accommodations directed at drawing or keeping consumers on the property so as to participate in agricultural activities of the property support a conclusion of agri-tourism:

(1) What accommodations are provided to visitors?

(2) What is the duration and frequency of visits?

(3) What, if anything, do visitors pay?

(4) Is the agri-tourism activity best described as a farm stay, work exchange, or educational stay?

(5) What products or services are provided to visitors while they are on the property?

(6) Are meals provided to visitors and, if so, are they prepared with products and commodities grown on the property?

(7) What involvement, if any, do visitors have with traditional agricultural operations?

The foregoing is not meant to be an exhaustive list of considerations in reaching a conclusion as to whether an activity is agri-tourism or non-agricultural commerce, but is meant only to suggest some relevant factors to be weighed in reaching that conclusion.

Relevant Laws and regulations: M.G.L. c. 128, Sec. 1A, c. 40A, Sec. 3, c. 61, c. 61A, c. 131, Sec. 40, c. 111, Sec. 125A, 330 CMR 22.02; The State Building Code (Among other sections 780 CMR 312; 780 CMR 120.C)